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In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,

Petitioner,

v.

SPENCER FOUNTAIN,

Respondent.

and

EVA L. JACKSON,

Petitioner,

v.

JUNIUS I. JACKSON,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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EUNICE S. FOUNTAIN,

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EVA L. JACKSON,

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v.

JUNIUS I. JACKSON,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners pray that writs of certiorari issue to review judgments of the Supreme Court of Virginia in these two cases, consolidated there for appeal, rendered November 26, 1973.

OPINIONS BELOW

The opinions below are reported at 214 Va. 347, 200 S.E.2d 513, and 214 Va. 351, 200 S.E.2d 515, and appear

as Appendix A at pp. 17-21 *infra*. The trial court opinion in *Jackson* is Appendix B, p. 22 *infra*. None was written in *Fountain*.

JURISDICTION

The final judgments of the state supreme court were rendered November 26, 1973. Execution thereon was stayed pending action on this petition by orders entered January 4, 1974. Appendix C, pp. 23-25 *infra*.

Jurisdiction is based on 28 U.S.C. § 1257(3). Cases supporting jurisdiction include *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964), and *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

QUESTION PRESENTED FOR REVIEW

When a state supreme court in 1971 overrules prior common law rulings that one spouse cannot sue another, and minor child cannot sue parent, for motor vehicle negligence, and thereby permits recovery for injuries sustained in *1968* by the appellants in those cases, and other parties, including petitioners here, have brought actions against their spouses for injuries arising out of automobile accidents occurring in *1970*, does a denial of limited retrospective operation of the overruling decisions, so as to bar petitioners' actions, deprive petitioners and other similarly situated claimants of their property without due process of law, or of equal protection of the laws, when their claims are covered by automobile insurance, and the proof shows no prejudice to insured or insurer, and no adverse effect on insurance rates, by permitting such limited retrospective application, confined to claims for accidents occurring no earlier than those giving rise to the overruling decisions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Virginia (1950), Section 1-10:

> "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

STATEMENT OF THE CASE

Smith v. *Kauffman*, 212 Va. 181, 183 S.E.2d 190, and *Surratt* v. *Thompson*, 212 Va. 191, 183 S.E.2d 200, both decided September 1, 1971, overruling prior Virginia decisions holding that minor child could not sue parent, and spouse could not sue spouse, for personal injury caused by automobile negligence, involved injuries sustained on August 18, 1968, and June 23, 1968.[1]

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[1] Because the State Supreme Court's opinions ignore these crucial dates, and other important factual matter set out in the briefs and Appendix below, a full set of those papers is filed herewith and occasionally referred to herein. Appendix E, p. 28 *infra*, excerpts from the complaints in the *Smith* and *Surratt* cases, shows the dates of their injuries. Petitioners' briefs below will be cited herein as, e.g., "Jackson Brief" or "Fountain Reply Brief" and respondents' briefs as, e.g., "*Spencer* Fountain Brief." Both Jacksons incorporated the *Fountain* case briefs into theirs for brevity, pursuant to the order of the state court consolidating the cases for argument and granting the parties' prayer to place them on the privileged docket because "a question of exceptional importance to the Courts of the Commonwealth is involved." Junius Jackson Opening Brief, pp. 33-34. The crucial dates of the four accidents are discussed in Fountain Brief, pp. 8-9; Fountain Reply Brief, pp. 5-6, 8; Jackson Brief, pp. 5-6.

Petitioner Jackson was injured August 9, 1970, and by awarding her an $8,000 verdict, the jury found her injuries were caused solely by the negligence of her husband. Petitioner Fountain was injured August 11, 1970, and the jury found her husband's negligence was the sole cause of the three-vehicle accident in which she was injured.[2]

Both respondents were insured by State Farm Mutual Automobile Insurance Company under policies which *did not say* that intrafamily suits were not covered, and the insureds were never told this.[3]

In each case, substantial property damage was caused, and State Farm knew that Virginia had long allowed interspousal suits for property damage.[4] Petitioner Jackson's car was a total loss.[5] As insurer for respondent Fountain, handling both medical payments and substantial property damage claims, State Farm said in December, 1970, that it had made "a careful investigation" of the accident, including a verbatim transcript of a prompt interview with a disinterested witness slightly over a month after the accident, and shortly knew "all of" petitioner Fountain's injuries.[6]

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[2] Respondent Fountain was dismissed as a defendant before trial on a ruling that *Surratt* would not be applied retrospectively. Appendix D, p. 26 *infra*. The jury found in favor of the other two defendants under Instruction 1, which said it could do so only if respondent Fountain's negligence was the sole cause of the accident. Appendix below, p. 29. The court below refused to review the judgment in favor of those drivers. Appendix C, p. 23 *infra*.

[3] Fountain Stipulation, Appendix below, p. 3, ¶ 5; respondent Jackson's deposition, original record below, p. 73; Jackson Brief, p. 3. Insurers were less reluctant to give information on the subject to their insureds in other states whose decisions apparently were relied on by the court below. See p. 10 *infra*.

[4] E.g., *Vigilant Insurance Co.* v. *Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

[5] Original record, pp. 49-52.

[6] Appendix below, pp. 21-28, 47.

Depositions of state insurance rate analysts, read in both cases, show that neither the old rule of intrafamily immunity, nor retroactivity of the decisions abolishing them, would have any effect on insurance rates, and that it had never been suggested that such immunities were a factor in rate making in any Virginia rate proceeding, including a recent filing by State Farm itself, the country's largest insurer, which in 1971 collected in Virginia auto liability premiums of over $30,000,000 and paid losses of less than $17,500,000.[7]

THE STAGE AND MANNER IN WHICH THE FEDERAL QUESTIONS WERE PRESENTED BELOW

Petitioner Fountain raised the constitutional questions here presented in the trial court by her objection to its pretrial order granting respondent Fountain's motion for summary judgment and, after verdict against petitioner, in her objection to its order denying a new trial, and by her assignments of error. Appendix D, pp. 26-28 *infra*. Petitioner Jackson had no occasion to do so because she prevailed in the trial court. Appendix B, p. 22 *infra*. In the state supreme court the constitutional questions were argued at pp. 5 and 6 of petitioner Jackson's Brief; p. 8 of petitioner Fountain's Opening Brief; p. 8 of her Reply Brief, and orally.

REASONS FOR GRANTING THE WRIT

Petitioners point out not only invidiously discriminatory application of changed state law as to them, but also that there are many other seriously injured Virginians similarly situated—some hurt only *a few days* before the overruling *Smith* and *Surratt* decisions—who likewise find the court-

[7] Appendix below, pp. 9, 11, 13-15, 19-20; Fountain Opening Brief, p. 4.

room doors barred unless the judgments below are reversed. Some are expected to pray leave to appear as *amici curiae* herein.

Nor is this a peculiarly Virginian problem. The court below, in citing with approval foreign decisions denying retrospective application to cases abolishing intrafamily immunity, curiously ignored later decisions *from those states*, cited to the Court below and discussed at pp. 10-11 *infra*, which show that the very problem presented by this petition continues to be dealt with there, and probably will come before this Court from another state if *certiorari* is not granted herein.

Where deprivation of Fourteenth Amendment rights is charged, it makes no difference whether state power is exerted by a court changing, applying, or ignoring a common law rule, or by a legislature, or whether it is in a civil action. *Ex Parte Virginia*, 100 U.S. 339, 346-7 (1879); *New York Times* v. *Sullivan*, 376 U.S. 264, 265 (1964); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930).

Thus recent analogous decisions concerning interpretation of state *legislation* are pertinent here:

Glona v. *American Guarantee and Liability Ins. Co.*, 391 U.S. 73, 75 (1968), held that construing a state death statute to forbid suit for death of an *illegitimate* child denied his mother equal protection of the laws: "A law which creates an open season on illegitimates *in the area of automobile accidents* gives a *windfall to tort feasors.*"[8] (Italics added here and below.)

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[8] The intrafamily immunity rule in the same area was said by the dissenter in since-overruled *Franco* v. *Davis*, 51 N.J. 237, 239 A.2d 1, 4 (1968), to have only one effect: "giving *a substantial windfall* to the insurance carrier." This is proven by the evidence in the present case. See pp. 4-5 *supra*.

In deciding the same day that a state court may not constitutionally construe a death statute to deny recovery to illegitimate beneficiaries, the Court in *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968) (cited to, but ignored by, the court below), said for a state rule to be sustained under the equal protection clause it must *not* "draw a line which constitutes an invidious discrimination against a particular class"; "the line drawn" must be "a rational one." Applying *Levy* to a state workmen's compensation case in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, (1972), the Court said validity of a state rule of law under the equal protection clause "requires, at a minimum, that a statutory classification bear some *rational relationship to a legitimate state purpose.*" The state has an interest in facilitating recovery for persons hurt in automobile accidents, as evidenced by the incidence of insurance aided by state legislation discussed in *Smith* v. *Kauffman*, 212 Va. at 184-85, 183 S.E.2d at 193-94. The uncontradicted evidence in this case, showing *no prejudice* to insurers or insureds from permitting retroactivity of *Smith* and *Surratt*, belies any legitimate state purpose to support Virginia's allowance of tort recovery to some intrafamily claimants hurt in 1968 and 1971, while flatly denying it to petitioners, hurt in 1970, and others similarly situated.[9]

The court below, while not explicitly mentioning the equal protection question presented to it, in passing referred

[9] The legislative branch apparently considers denial of compensation to many auto accident victims is also a matter of serious *Federal* concern. See, e.g., the National No-Fault Motor Vehicle Insurance Act, S. 945, 92nd Congress, and Senate Commerce Committee Reports 92-891, criticizing (p. 16) the situation in which "no liability insurance benefits now [are] paid to certain classes of victims," and 93-382, criticizing (p. 21) the fact that: "People who pay insurance premiums may receive no insurance benefits . . . when they are injured in an accident."

to various *criminal procedure* decisions of that court and this, including *Linkletter* v. *Walker*, 381 U.S. 622, 624-5, 638, 640 (1965), which quoted Mr. Justice Cardozo on retroactivity of repeal of a rule that might "work hardship to those who [had] trusted to its existence"; said a decision on retroactivity should be based on avoidance of "*injustice or hardship*," and concluded that opening up countless *criminal* convictions "would seriously disrupt the administration of justice," holding no more than that a change in decisional law to exclude illegally acquired evidence from state trials did not require the court "to overturn all *final*[10] convictions based upon it."

In the only *civil* case decided by this Court referred to below, *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), a prior decision invalidating a state scheme for financing sectarian schools was held *not* to be applied retroactively so as to require refund of past payments, because "the schools' reliance on promised payment for expenses incurred by them" *before* the date of the decision in *Lemon* I, and their "*reliance* on the state statute" there invalidated "*inviting* the contracts made and authorizing reimbursement for *past* services," far outweighed "the *remote possibility* of constitutional harm from allowing the State to keep its bargain." The Court said in determining whether to "reach back to disturb or to attach legal consequences to patterns of conduct" it should use a "balancing approach: we looked to 'the prior history of the rule in question, its purpose and effect, and whether retrospective operations will further or retard its operation.' " 411 U.S. at 198, 199, 203.

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[10] Of course, at the time the court below decided the *Smith* and *Surratt* cases, petitioners' had not yet been litigated. Mr. Justice Cardozo has pointed out that a challenged tort rule "may not reasonably be supposed to have determined the conduct of the litigants." *Nature of the Judicial Process*, quoted in *Silesky* v. *Kelman*, 281 Minn. 431, 161 N.W.2d 631, 633 (1968).

Lemon I and II thus provide a classic example of a type of change in decisional law which should *not* be given retrospective effect, according to Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201 (1965), an article cited by, but whose reasoning was ignored by, the court below. Municipal finance, like title to property and commercial transactions, is a field in which Professor Currier points out *true* past justifiable reliance on overruled law is involved. But: "The history of Anglo-American *tort* law has been largely that of *retroactive* judicial expansion of tort liability, *without concern for the tortfeasor's reliance*. . . The *weightier interest* here, at least by modern standards, seems to lie with the tort victim; his plight demands compensation, even at the expense of revising precedent, and the demand has *traditionally* been answered in a retroactive way. . . . More important, the courts *need not go as far to protect such reliance* as may exist in this area as in the *property* field, because here *reliance, such as it is, is at best only one-sided*, and to protect it *requires denial of equality to tort claimants* . . . [T]here is *no rational basis* for distinguishing between tort claimants injured before and after the overruling decision . . . [C]ourts . . . seem to have reached the best result in retroactively applying new rules expanding tort liability."[11]

It is this denial of *equality* of which petitioners complain, on their own behalf and on behalf of similarly situated claimants in Virginia and elsewhere. That the problem is indeed nationwide is documented by the misreading by the court below of the law of allegedly "prospective-only" states, only *some of* whose decisions (although others were cited in the briefs) it mentions in its opinions (pp. 19-20 *infra*).

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[11] 51 Va. L. Rev. at 201, 244-45, discussed in Fountain Brief, pp. 6, 8; Fountain Reply Brief, p. 2.

It was clearly pointed out in Fountain Opening Brief, pp. 5-6, and Fountain Reply Brief, pp. 6-7, that:

Darrow v. *Hanover*, 58 N.J. 410, 278 A.2d 200, 201, 207 (1971), simply denied recovery for a 1967 accident, occurring about a year *before* that involved in the overruling decision of *Immer* v. *Risko*, 56 N.J. 283, 267 A.2d 481 (1970); *Darrow* was followed by *Gotsch* v. *Gotsch*, 63 N.J. 217, 306 A.2d 433, 435 (1973), where the court *allowed* suit by a spouse hurt *before Immer* was decided because in the *Gotsch* case, like those of petitioners here, there was "no reliance by the insurance company" on prior law; and until shortly before the *Immer* accident, New Jersey's standard auto policy *expressly excluded* coverage for "any member of the family of the insured." 278 A.2d at 203.

Similarly in *Beaudette* v. *Frana*, 285 Minn. 366, 173 N.W.2d 415, 418 (1969), which made an earlier overruling decision *not* retrospective to cover accidents occurring before that in the earlier case, the court there took pains to point out that it was not *until 1969* that a Minnesota statute *forbade* exclusion of relatives from auto insurance coverage;[12] later *Eicher* v. *Jones*, 285 Minn. 409, 173 N.W.2d 427 (1970), allowed suit for an accident occurring *before* that involved in *Silesky* v. *Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968), *Beaudette's* twin, and *Barile* v. *Anderson*, ... Minn. ....., 203 N.W.2d 366 (1972), allowed suit

[12] No such candor obtained between respondents herein and State Farm (p. 4 *supra*), although the secretly excluded petitioners obviously were among "those whom the insured would most desire to protect." *Xaphes* v. *Mossey*, 224 F. Supp. 578, 579 (D. Vt. 1963).

for an accident occurring *after* those in *Beaudette* and *Silesky* but *before* the *decisions* in those cases.[13]

The equal protection clause does *not* require total retroactivity, as decreed in *Gelbman* v. *Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194 (1969), because by abolishing intrafamily tort immunity the court did *not* create "liability where none previously existed" but rather permitted "recovery previously denied, where liability has been established."[14]

It requires only retroactivity to cover injuries occurring (like here) *after* the date of the injury involved in the overruling decision, as established in the course of two rehearings in *Rigdon* v. *Rigdon*, 465 S.W.2d 921 (Ky. 1971). The original *Rigdon* opinion of December 18, 1970, did *not* deal with the retrospective-prospective issue. The order

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[13] Citation by the court below of *Vickers* v. *Vickers*, 109 N.H. 69, 242 A.2d 57 (1968), also failed to mention that *Vickers* held only that retroactivity would not be given to permit suit for an accident occurring *before* that involved in the earlier overruling decision of *Briere* v. *Briere*, 107 N.H. 432, 224 A.2d 588 (1966). Its mention of *Goller* v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963), inexplicably omitted the explanation in *Fitzgerald* v. *Miessner*, 38 Wis.2d 571, 157 N.W.2d 595, 598 (1968), that *Goller* denied retroactive application of permission of suit by child against parent *solely* because it could have resulted in suits *by minors* for injuries occurring 20 years before. This was, of course, a groundless fear. As a Virginia trial judge pointed out, the problem of whether suits for "accidents which occurred 5, 10, 15 or more years ago" should be permitted can be met when such a suit is filed. Fountain Opening Brief, pp. 5, 6, 14. A better solution is that adopted by Kentucky, Texas and California, p. 12, *infra*. These important facts were stressed below in Fountain Opening Brief, pp. 5-6; Fountain Reply Brief, pp. 5-7, and orally.

[14] The Virginia bar reasonably could have thought this was the rationale of *Smith* and *Surratt*, since in *Worrell* v. *Worrell*, 174 Va. 11, 22, 23, 4 S.E.2d 343, 348 (1939), cited in both *Smith* and *Surratt*, the court said intrafamily immunity arose "from a disability to sue, and not from lack of violated duty." Two Virginia trial judges noted the soundness of the *Worrell-Gelbman* rationale. Fountain Brief, pp. 11, 14, 16-17.

on rehearing of February 26, 1971, said *Rigdon* would apply only to causes of action arising *after* that date. But after intervention by infants with actions pending, who were hurt *before* the latter date, and *after* the date of the *Rigdon* accident, the court *again* modified its opinion and applied its decision overruling parental immunity to the case at bar and *also* to "all other cases in which the injury complained of occurred on or after May 9, 1969, *the date of the accident in the present case,* 465 S.W.2d at 923, thus avoiding the equal protection question created by its first rehearing decision.[15] Texas, citing *Rigdon,* similarly allowed the limited, equality-based retroactivity petitioners contend for here. *Felderhoff* v. *Felderhoff,* ..... Tex. ....., ..., 473 S.W.2d 928, 933 (1971). And see *Jones* v. *Los Angeles,* 215 Cal. App.2d 155, 30 Cal. Rptr. 124, 125 (1963), which permitted suit for assault by police officers occurring before the decision in the case abolishing the doctrine of governmental immunity but after the date of the acts upon which the claim involved in that decision was based, because plaintiff's cause of action was a vested right of which he could not be deprived by later state "moratorium" legislation temporarily re-enacting the immunity doctrine and suspending the effect of the overruling decision.

When the court said that the *Smith* and *Surratt* claimants, injured in 1968, *could* recover, and also those similarly situated who were hurt after September 1, 1971, date of the *Smith* and *Surratt* opinions, but that those similarly situated and injured between these dates may not, denial to them of the right to litigate—including the right to seek, as the *Surratt* claimant was allowed, to *overturn* the old

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[15] All parties relied below on *Rigdon*. Spencer Fountain Brief, pp. 7, 10, incorporated in Junius Jackson's Brief, p. 34; Eunice Fountain Reply Brief, pp. 5, 6, 8. *Rigdon* was cited but not discussed by the court below (p. 19 *infra*).

immunity doctrine—also violates the requirement of equal protection placed in a *procedural* context as in, e.g., *Stanley* v. *Illinois*, 405 U.S. 653, 658 (1972), and *Lindsey* v. *Normet*, 405 U.S. 862, 876 (1972), where this Court held in another context: "When an appeal is afforded . . . it cannot be granted to *some* litigants and capriciously or arbitrarily denied to *others* without violating the equal protection clause," citing many cases. In *Smith* and *Surratt* claimants were afforded appeals to attack the rule that they could not sue father and spouse; petitioners here, although allowed to go through the expensive formality of appeal, found this right an empty shell, for they were capriciously denied the right to try to change prior law the earlier accident victims had enjoyed. Similarly analogous is the holding that a judicial system which allows a legitimate child, but *not* an illegitimate one, *to litigate* his alleged right to support from his father discriminates invidiously contrary to the equal protection clause. *Gomez* v. *Perez*, 409 U.S. 535 (1973).

This denial similarly deprives petitioners of their property without *procedural* due process.

"When a state court overrules a consistent line of *procedural* decisions with the *retroactive* effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive rights.'" *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930); *Bouie* v. *Columbia*, 378 U.S. 347, 354 (1964).

The court below frankly reversed,[16] and *retrospectively* applied this abrupt change *to petitioners*, the rule it set down long ago in *Saffel* v. *Orr*, 109 Va. 769, 774, 64 S.E. 1057, 1059 (1909), that:

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[16] 214 Va. at 348, 200 S.E.2d at 513, p. 18 *infra*.

" 'The effect of overruling a decision and refusing to abide by the precedent there laid down is retroactive and makes the law at the time of the overruled decision as it is declared to be in the last decision.' 26 Am. & Eng. Enc. L. 179."

The encyclopedia reference makes it clear that this is an English common law principle imported to Virginia by its reception statute.[17] The *Saffel* pronouncement, reaffirmed in *Memorial Hospital* v. *Oakes*, 200 Va. 878, 889, 108 S.E.2d 388, 396 (1959), and *denial* of a rehearing in *Smith* v. *Kauffman*, where defendant sought to make that ruling prospective only,[18] surely led the bar to justifiably rely on the common law principle of retroactivity in deciding to go to the expense of trial after *Smith* and *Surratt* were decided.

It has been suggested that limiting retroactivity to the successful claimant in the overruling decision, as the Virginia Court has done, is justified as a "reward" to that claimant and his counsel for succeeding in law reform.[19] If such a distinction could possibly be supported under any circumstances, it is unusually strange to apply it here where both petitioners had as trial and appellate counsel the same attorney who was trial and appellate counsel in *Smith* v. *Kauffman*, in which Virginia abolished parental immunity.[20]

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[17] Code of Virginia (1950), § 1-10, quoted at p. 3 *supra*. See Currier, *supra*, 51 Va. L. Rev. at 205, quoting Mr. Justice Holmes: "Judicial decisions have had retrospective operation for near a thousand years." See also Fountain Brief, p. 6.

[18] This was pointed out below in Jackson Brief, p 6; Fountain Brief, p. 6.

[19] E.g., *Molitor* v. *Kaneland Community Unit District*, 18 Ill.2d 11, 28, 163 N.E.2d 89, 97 (1959), discussed and criticized in *Currier supra*, 51 Va. L. Rev. at 214-5. This bizarre theory was also cited by a Virginia trial judge, Fountain Brief, p. 21.

[20] *Surratt* v. *Thompson*, overruling interspousal immunity the same day, depended almost entirely for its rationale on *Smith*. 212 Va. at 194, 183 S.E.2d at 202.

He filed suit attacking interspousal immunity on behalf of Petitioner Jackson 4 months *before Smith* and *Surratt* were decided.[21] Petitioners cannot constitutionally be denied the rights the *Smith* and *Surratt* claimants were given—i.e., to attack the admittedly anachronistic immunity doctrine—solely because petitioners were hurt, and filed, later, as the courts of Kentucky, Minnesota, Texas and California have appreciated (pp. 10-12 *supra*).

Procedural due process is further violated by the court's *assumption* that the discrimination it enforced was justified because it was "*conceivable* that persons would rely on the existing state of the law in determining what financial protection they needed; and that insurance companies . . . also justifiably relied on the existing law in evaluating the risk entailed, the premiums to be charged, and in deciding whether to investigate an accident. . ." 214 Va. at 349, 200 S.E.2d at 514 (p. 20 *infra*), flatly ignoring the uncontradicted evidence in the record in petitioners' cases which proves there was no such justifiable "reliance." This was an unfair and constitutionally impermissible exemption of petitioners and respondents from the general Virginia rule that a court may not render a judgment based on arbitrary disregard of the uncontradicted evidence before it.[22]

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[21] Original Record, p. 1.

[22] *Hodge* v. *American Family Life Assurance Co.*, 213 Va. 30, 31, 189 S.E.2d 351, 353 (1972). If it should be argued that the court gave weight to the suspiciously almost verbatim *ex parte* affidavits somebody drafted for the signatures of claimsmen in other cases (Appendix below, pp. 33-40) saying that in intrafamily claims some companies had tried to save money by eschewing normal investigations, notwithstanding the easily predictable fact that these immunities were on the way out (Fountain Opening Brief, pp. 7-8), it would have to be by the court below ignoring in petitioners' case only its long-standing rule that affidavits consisting of obviously lawyer-manufactured "evidence" signed by compliant witnesses should be treated with contempt and ignored as nullities. *Griffin* v. *Tomlinson*, 159 Va. 161, 170, 165 S.E. 374, 377 (1932).

CONCLUSION

Certiorari should be granted and the judgments below reversed, with directions to enter judgment on the verdict in favor of petitioner Jackson and to grant petitioner Fountain a new trial.

Respectfully submitted.

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